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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUISEPPE CASTORINA,
Petitioner

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the Longshoremen's and Harbor Workers' Compensation Act, the law in effect on the date when a longshoreman is injured by the inhalation of a toxic substance governs the substantive rights and liabilities of the parties.

2. Whether a shipowner is obligated by Occupational Safety and Health Act regulations to protect longshoremen who may be harmed by the shipowner's violation of a regulation.

3. Whether a shipowner, by performing its own stevedoring operations, is charged with constructive or actual knowledge of Occupational Safety and Health Act violations committed by the stevedore arm of the same corporation.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Guiseppe Castorina ("Castorina") respectfully petitions this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 758 F.2d 1025, is reprinted in the Appendix at A-1. The judgment of the United States District Court for the Southern District of Texas, reported at 578 F. Supp. 1153, is reprinted in the Appendix at A-25.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 15, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1966).

STATUTES INVOLVED

This case is based on the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* (1978), and Occupational Safety and Health Act ("OSHA") regulations, 29 C.F.R. §§ 1504.2 and 1504.102(c)(1) (1965). The texts of pertinent provisions are found in the Appendix at A-48 - A-49.

STATEMENT OF THE CASE

Statement Of The Facts

Respondent, Lykes Bros. Steamship Co., Inc. ("Lykes"), owned ships which brought cargos of raw asbestos into the Port of Galveston, Texas between 1965 and 1972. Lykes also carried out its own stevedoring operations, acting in the dual capacity as both shipowner and stevedore. During 1965 to 1972 Lykes employed Castorina as a longshoreman to offload loosely woven burlap bags containing raw asbestos. The bags were often torn open during shipment, and the longshoremen upon entering the holds of the vessels would find raw asbestos loose in the holds. The dust was so pervasive at times during offloading that it would actually cause clouds of asbestos in the holds of the vessels. The asbestos would cling to the bodies and clothing of the longshoremen to such an extent that they would have to wipe their mouths, expectorate, or take a drink of water to clear their mouths and throats of the raw asbestos. After the burlap bags

were discharged, longshoremen cleaned the holds by sweeping the loose asbestos that was several inches deep.

Castorina in handling the asbestos cargo was exposed to and inhaled large amounts of raw asbestos dust. Lykes did not provide masks or respirators to Castorina, nor did Castorina or any of his co-workers wear respirators when working with the asbestos cargo. Lykes knew of the extremely dusty conditions and knew that the men were not wearing respirators.

Castorina consulted a physician in 1975 for wheezing and respiratory discomfort. In 1979, Castorina was diagnosed as suffering from asbestosis caused from repeated exposure to and inhalation of asbestos dust. Castorina sued Lykes as shipowner under 33 U.S.C. § 905(b), even though Lykes was his employer.[1]

Conclusions By The District Court

The District Court concluded that Castorina was not entitled to recover for the reasons that the applicable provisions of the LHWCA were those in effect in 1979 when Castorina's asbestosis was diagnosed; that Lykes did not, therefore, owe Castorina a duty to provide a seaworthy vessel under pre-1972 law; that even if pre-1972 law applied, the vessel was seaworthy; and that Lykes as shipowner had not been negligent in the stowage or carriage of the asbestos.

The Court Of Appeals' Decision

The Court of Appeals affirmed, holding that the controlling date for determining the applicable law for third

1. This fictional division is permitted by Reed v. The Yaka, 373 U.S. 410 (1963), to insure like treatment to all longshoremen under the law.

party claims under 33 U.S.C. § 905(b) is the date when a latent disease is diagnosed. The Court of Appeals affirmed the District Court's conclusion that Lykes did not owe Castorina a warranty of seaworthiness "because Castorina's injury did not occur until after the 1972 amendments to the LHWCA." 758 F.2d at 1031. Because of this conclusion the court found it unnecessary to review the District Court's finding of seaworthiness.

The Court of Appeals stated that Lykes as shipowner was not obligated to follow an OSHA regulation requiring that respirators be provided for protection against pneumoconiosis producing dust and that, therefore, Lykes was not negligent for failing to provide the respirators. Lykes was the shipowner and performed its own stevedoring operations. The court reasoned that the regulation did not apply to Lykes as shipowner but applied to Lykes only in its capacity as stevedore.

Castorina does not attack the lower court's review of the evidence but submits that the court misapplied the law concerning the date of injury in third party actions under the LHWCA and concerning the duty under OSHA regulations to protect longshoremen from hazardous conditions.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' ruling equating "injury" with diagnosis conflicts with other circuit court decisions and with the definition of "injury" found in the statute.

The Court of Appeals' definition of "injury," that injury is the date when a latent disease is diagnosed,

squarely conflicts with the definition of "injury" found in other circuit court decisions. Section 5(b) of the LHWCA, 33 U.S.C. § 905(b), established the right to bring a tort action against a shipowner and is intended to import tort principles. Diversity cases involving tort liability are, therefore, relevant in defining "injury" in a latent disease.

Other circuit courts have defined "injury" in asbestosis cases. Manufacturers of asbestos products were sued in products liability actions. Their insurance carriers denied coverage under liability policies, claiming that the "injury" did not occur and, thus, liability did not arise until asbestosis was diagnosed. Consequently, when "injury" occurred giving rise to liability was the crucial issue. The Fifth and Sixth Circuits stated that "injury" in asbestosis occurs shortly after the initial inhalation of asbestos fibers. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied,* 454 U.S. 1109 (1981); *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied,* 454 U.S. 1075 (1981). These cases involved insurance coverage for liability in tort suits. Likewise, suits under 33 U.S.C. § 905(b) involve tort actions, and the definition of "injury" under this section should be governed by analogous tort cases. Moreover, the holdings of *Porter* and *Forty-Eight Insulations,* that asbestosis results from the initial inhaling of asbestos fibers, conform with the definition of "injury" found in the LHWCA. "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease . . . as naturally or unavoidably *results from such accidental injury*" (emphasis added). The definition applies to both the initial injury as well as any occupational disease arising out of such injury. 33 U.S.C. § 902(2).

The Court of Appeals' holding, that "injury" is the diagnosis of a latent disease, produces an incongruous result. In a prior ruling, *Harrison v. Flota Mercante Grancolumbiana, S.A.*, 577 F.2d 968 (5th Cir. 1978), the Fifth Circuit Court found that the operative facts of inhaling fumes of a toxic chemical occurred prior to the effective date of the 1972 amendments to the LHWCA and that, consequently, pre-1972 law applied. However, when confronted with facts almost identical to those in *Harrison* the court below held that post-1972 applied since Castorina's asbestosis was not diagnosed until 1979. Such was the holding below, even though, as in *Harrison*, the operative facts giving rise to this suit occurred prior to 1972. Further, the court's distinction between traumatic injury and latent disease, both caused by the same wrongful acts occurring before 1972, yields an incongruous and absurd result, a result certainly not intended by Congress.

Doubtless, there are thousands of longshoremen working in ports around the country who, before 1972, were injured by a toxic substance but have yet to be diagnosed as having an occupational disease. Moreover, many cases involving asbestosis are currently pending. In all of those cases, courts will be faced with conflicting circuit decisions as to when "injury" occurred attaching liability. Given the frequency with which the rule of the court below would be dispositive in such cases, its correctness should be addressed by this Court.

2. There is a conflict among the circuits as to the application of OSHA regulations.

Section 41 of the LHWCA makes OSHA regulations applicable to longshoring work. 33 U.S.C. § 941. The

question presented in the instant case is whether Lykes as shipowner, employer of seamen, was obligated to follow OSHA regulations and provide respirators to the longshoremen, employees of Lykes as stevedore. Circuit courts have differed as to whether one employer owes a duty under OSHA only to his own employees or also to the employees of another employer. OSHA regulations are intended to prevent work-related injuries and to improve the tragic and intolerable working conditions such as those found in longshoring. Longshoremen necessarily perform their duties on and around vessels, not just on their employers' restricted premises as many land-based employees do. The question of whether a shipowner or only a stevedore is responsible for complying with OSHA regulations frequently will be raised, especially when a hazardous condition is created by a shipowner. Accordingly, this case is an appropriate vehicle for considering whether OSHA regulations apply to persons other than an employee's own employer.

The court below held that the OSHA regulation requiring respirators applied only to Lykes in its capacity as Castorina's employer, not to Lykes as shipowner. The regulation provides, "For protection against pneumoconiosis producing dusts, a respirator equipped with a type of filter provided for such purposes shall be used." 29 C.F.R. § 1504.102(c)(1) (1965). Lykes occupied the role of two different employers: Lykes, the shipowner, employed seamen; Lykes, the stevedore, employed longshoremen. There is a complex dispute among the circuits as to whether OSHA regulations impose a duty on one employer to provide safe working conditions for the employees of another employer. In *American Petroleum Institute v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *aff'd*,

448 U.S. 607 (1980), the Fifth Circuit rejected the argument that an OSHA regulation requiring each employer to assure that caution labels were affixed to containers of benzene applied only to the employer in protecting his own employees. The court ruled that a duty of compliance exists on the part of an employer who has created a hazard. Similarly, in *Beatty Equipment Leasing Co., Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978), the Ninth Circuit Court of Appeals held that a subcontractor who erected a dangerous scaffold owed a duty under OSHA to the employees of lathing and plastering subcontractors. The policies of OSHA "can best be effectuated by placing the responsibility for hazards *on those who create them.*" 577 F.2d at 537 (emphasis added). Accordingly, even if a valid distinction can be made between Lykes as shipowner and Lykes as stevedore, Lykes, in either capacity, had a duty under OSHA regulations to protect workers from hazards which it created. The holds filled with loose asbestos was a hazard created by Lykes as shipowner.

The Secretary of Labor, in the OSHA regulations applicable to longshoring, defined "employer." In explaining this definition the Secretary noted situations in which a shipowner may also act as a longshoreman's employer. In such instances, the regulations expressly state that additional duties are placed upon shipowners. 29 C.F.R. § 1504.2(b) (1965).

Moreover, the cited regulation directs that shipowners shall not be relieved of duties placed upon them by law. Landmark cases have established standards for determining negligence per se for violation of regulations. *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964); *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963).

Marshall established a three-part test to determine negligence per se for the violation of regulations: (1) was there a violation of the regulations? (2) were the regulations designed to protect longshoremen? and (3) were the regulations intended to protect against the risk of the kind of harm that occurred? The Fifth Circuit has applied this test to find negligence per se in at least two cases decided since the 1972 amendments to the LHWCA. *Reyes v. Vantage SS Co., Inc.*, 558 F.2d 238 (5th Cir. 1977) (For violating a Coast Guard regulation, a vessel owner was found negligent per se in the drowning of a seaman); *Arthur v. Flota Mercanta Gran Centro Americana, S.A.*, 487 F.2d 561 (5th Cir. 1973) (A vessel owner was found negligent per se when an inspector was injured by a fall from a ship's ladder.)

Although *Provenza* was principally concerned with the doctrine of unseaworthiness, it also spoke to the issue of negligence.

> It follows, of course, if the jury should find that the stevedore had violated the regulations such conduct could also constitute negligence. If in turn the negligent conduct of the stevedore were known, or by exercise of reasonable care should have been known by the shipowner, and such negligence of the shipowner was a proximate cause of the plaintiff's injury then he too would be liable to the plaintiff on the additional grounds of negligence.

324 F.2d at 665.

Nothing in the 1972 amendments of the LHWCA changed the standards for negligence per se in the violation of a regulation. Section 1504.2(b) charged shipowners with "duties now placed upon them by law."

Although the *Marshall* and *Provenza* standards continued to apply, the court below nevertheless disregarded these standards in its holding that OSHA regulations did not apply to Lykes as shipowner. The Court of Appeals' decision conflicts not only with *Marshall* and *Provenza* but also with 29 C.F.R. § 1504.2(b) (1965).

Further, the decision of the court below conflicts with a recent Ninth Circuit decision which held that OSHA regulations are binding on the shipowner where he knew or should have known of a violation of the safety regulations. *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979), *vacated on other grounds*, 451 U.S. 978 (1981). The court below held that Lykes as shipowner was not negligent even though it knew that the longshoremen were not being provided respirators to work in the dusty conditions, an OSHA violation. This holding directly conflicts with the *Bachtel* opinion.

In focusing on Lykes' dual capacity as shipowner and stevedore, the Court of Appeals ignored Congress' intent to protect longshoremen from the dangers inherent in their profession. In amending the LHWCA 1972, the Senate specifically addressed protection of the longshoremen through OSHA regulations:

> Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's com-

> pensation system which maximizes industry's motivation to bring about such an improvement.

S. Rep. No. 1125, 92d Cong., 2d Sess., 2 (1972).

The House of Representatives echoed its concern:

> The Committee wishes to emphasize that nothing in this bill is intended to relieve *any vessels* or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970. The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third-party suit question if it appears that the changes made in the present law by this bill has affected progress in improving occupational health and safety.

H.R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong & Ad. News 4698, 4705 (emphasis added). The words of Congress, unheeded by the court below, demonstrate a clear intent to hold shipowners responsible for obligations under OSHA regulations. Certainly, by allowing a shipowner to perform its own stevedoring operation and thereby evade its responsibilities under OSHA regulations would defeat legislative intent.

OSHA regulations are an integral part of Congress' plan to improve the working conditions of longshoremen. The ruling of the court below is in direct conflict with OSHA regulations promulgated pursuant to the LHWCA, with other circuit court decisions that established standards for regulatory violations, and with legislative intent

to vigorously apply OSHA regulations in the longshoring industry. Resolution of these conflicts is particularly important to the future litigation of longshoring cases.

3. The Court of Appeals' ruling that Lykes' shipowner arm did not know of the OSHA violation by its stevedore arm contradicts fundamental corporate principles.

This Court in *Reed v. THE YAKA*, 373 U.S. 410 (1963), authorized a separate action against the vessel under 33 U.S.C. § 905(b) even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner. By this fictional division a vessel owner acting as its own stevedore is held liable for negligent actions done in its owner capacity.

The court below has used the fictional division created in *Reed v. THE YAKA* to shield Lykes as shipowner from consequences of the knowledge possessed by Lykes as stevedore. This is not in keeping with the rationale of *Reed v. THE YAKA* to give equal treatment to all longshoremen. The court below stated: "[L]ykes was entitled to rely on its stevedoring arm to perform the cargo operations properly and had no duty to intervene in the cargo operations *which it did not know to be improper.*" 758 F.2d at 1036. This statement contradicts the fundamental principles of corporate law, as well as ordinary logic. Lykes is one corporation, one entity. Although one division carried out "shipowner" activities and another division carried out "stevedore" activities, Lykes is nevertheless one juristic body with collective knowledge.

It is fundamental that a corporation is held responsible for the knowledge possessed by its agents through whom

it acts. The corporation is considered to have knowledge of all facts known to its representatives. See, *e.g., Steere Tank Lines, Inc. v. United States,* 330 F.2d 719, 722 (5th Cir. 1963) (corporation convicted for criminal violation on the basis of its manager's knowledge.)

It defies logic to say that Lykes' shipowner arm did not know that its stevedore arm was violating an OSHA regulation. Indeed, the court below stated, "Lykes knew of the dusty conditions and knew that the men were not wearing respirators." 758 F.2d at 1036. Lykes, the corporate entity, knew of the violation. Through its stevedore arm, Lykes had knowledge of the OSHA regulation protecting longshoremen, as well as knowledge of the violation of that regulation.

To allow a corporation to escape liability by dividing the corporation into divisions, one with knowledge of an OSHA violation and one without such knowledge, would be contrary to the philosophy of *Reed v. THE YAKA*. More importantly, to allow a corporation to shield one division from consequences of the knowledge possessed by another division would work an injustice. Such would be contrary to this Court's admonition that the LHWCA must be liberally construed in conformance with its beneficient purpose.

CONCLUSION

To address these issues of national concern, Castorina prays that the writ of certiorari be granted.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that on the 12 day of July, 1985, three true and correct copies of the foregoing instrument were sent by regular mail to Mr. James R. Watkins, Royston, Rayzor, Vickery & Williams, 205 Cotton Exchange Building, Galveston, Texas 77550.

_____

STEPHEN M. VAUGHAN

APPENDIX A

Guiseppe CASTORINA,
Plaintiff-Appellant,

v.

LYKES BROTHERS STEAMSHIP CO., INC., Defendant-Appellee.

No. 84-2047.

United States Court of Appeals, Fifth Circuit.

April 15, 1985.

Longshoreman who developed asbestosis after off-loading asbestos from shipowner stevedore's vessels brought suit under the Longshoremen's and Harbor Workers' Compensation Act to recover damages. The United States District Court for the Southern District of Texas, Hugh Gibson, J., 578 F.Supp. 1153, entered judgment in favor of shipowner stevedore, and longshoreman appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) provisions of the Act which eliminated a longshoreman's seaworthiness remedy against a vessel and replaced it with a negligence standard applied; (2) duty owed by shipowner to longshoreman under the Act is neither heightened nor diminished when longshoreman is employed directly by the vessel; and (3) shipowner stevedore was not negligent as a shipowner.

Affirmed.

Mandell & Wright, Stephen M. Vaughan, Houston, Tex., for plaintiff-appellant.

Stephen C. Embry, Cynthia L. Fausold, Groton, Conn., for amicus-Ass'n of Trial Lawyers of America.

Royston, Rayzor, Vickery & Williams, James R. Watkins, Ben L. Reynolds, Galveston, Tex., Howard R. King, Houston, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, and WISDOM and HIGGINBOTHAM, Circuit Judges.

WISDOM, Circuit Judge:

This appeal from a final judgment against a longshoreman who brought suit under the Longshoremen & Harbor Workers Compensation Act, 33 U.S.C. § 905(b), to recover damages from an allegedly negligent shipowner raises two important questions of interpretation of that Act. The plaintiff was exposed to asbestos dust while offloading asbestos from the defendant's vessels, and later contracted asbestosis. The defendant owned the vessels on which the asbestos was carried and conducted its own stevedoring operations. First, this court must decide whether the date of the plaintiff's last exposure to the asbestos or the date of manifestation of the disease is the relevant date of injury for determining what remedies are afforded the plaintiff by the LHWCA. Second, this court must determine the standard of care imposed by the LHWCA upon a shipowner-stevedore for actions undertaken solely in its capacity as shipowner. The district court, sitting in admiralty, found that the plaintiff was not entitled to recover, for the reason that the applicable

provisions of the LHWCA were those in effect in 1979, when the plaintiff's disease first manifested itself; that the defendant did not, therefore, owe the plaintiff a warranty of seaworthiness of the vessel; and that the defendant shipowner had not been negligent in the stowage or carriage of the asbestos. We affirm.

I.

The plaintiff, Guiseppe Castorina, was employed as a longshoreman in the port of Galveston, Texas, since 1955. Castorina was exposed to large amounts of asbestos dust on numerous occasions between 1965 and 1972 while offloading burlap bags containing raw asbestos from ships owned by several shipping lines including the defendant, Lykes Bros. Steamship Co., Inc. (Lykes).

The district court concluded from the evidence presented at trial that Castorina worked on Lykes vessels discharging asbestos approximately fifteen times between 1965 and 1972. Castorina and other longshoremen who worked at the Port of Galveston testified at trial that the asbestos carried on the Lykes vessels was shipped in loose-weave burlap bags and was stowed in the closed holds of the ships. The bags were often torn open during shipment and during the offloading process, and longshoremen handling the asbestos cargo were exposed to and inhaled large amounts of raw asbestos dust. The workers testified that the stevedores responsible for unloading this cargo did not provide masks or respirators to the workers, nor did the workers wear their own protective masks when working with asbestos cargo.

Castorina was last exposed to asbestos dust on a Lykes vessel in May 1972. In the spring of 1975, Castorina con-

sulted a physician, complaining of wheezing in the left side of his chest and of respiratory discomfort. Chest x-rays taken at that time revealed a dense infiltrate in the left anterior aspect of the right middle lobe; later x-rays, taken in October 1976, showed further manifestations of asbestosis. In 1979, Castorina was diagnosed as suffering from asbestosis.[1]

On October 9, 1980, Castorina brought suit against Lykes and against Hellenic Lines, seeking recovery under the LHWCA and under general maritime law for injuries sustained as a result of his exposure to raw asbestos while working aboard the defendants' vessels. By amended complaints filed on February 2, 1982 and June 21, 1982, Castorina added numerous other shipowners as party defendants. Lykes and other named defendants also filed third party complaints against various shipping and stevedoring companies. All of the direct defendants, except Lykes, and all third parties in this action either have settled or have been dismissed from this suit. Our specific inquiry on appeal, therefore, is limited to the question whether Lykes, as shipowner, is liable to Castorina under the LHWCA or under general maritime law.

At trial, Castorina contended that Lykes, as shipowner, owed to him under the LHWCA both a duty to exercise due care and a warranty of seaworthiness of the Lykes vessels on which he worked. Castorina further alleged that Lykes breached its warranty of seaworthiness by

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1. The record testimony and plaintiff's medical history shows that the plaintiff smoked two to three packs of cigarettes a day for 26 years. Castorina stopped smoking in 1969. The trial court found that the totality of plaintiff's medical history showed that his respiratory problems were caused by asbestosis, which the plaintiff contracted as a result of his repeated exposure to and inhalation of asbestos dust. This finding is not disputed on appeal.

shipping raw asbestos in bags that allowed the asbestos dust to escape, and by allowing the dust to accumulate in the holds of Lykes's ships. Castorina contended that Lykes knew or should have known of the danger to longshoremen presented by the asbestos dust and that Lykes negligently failed to protect Castorina from the hazards of asbestos exposure to which he was subjected while working aboard Lykes's vessels. Lykes argued at trial that Castorina's cause of action against Lykes did not accure until the asbestosis manifiested itself—sometime between 1975 and 1979. Lykes argued that the LHWCA as amended in 1972, which abolished the longshoreman's seaworthiness remedy against a shipowner, was applicable and that Lykes was not negligent in its handling of the asbestos cargo. It therefore urged the district court to hold that Lykes was not liable to the plaintiff for any injury.

The trial court found that the law applicable to the suit was that in effect on the date Castorina was diagnosed as having asbestosis and that Lykes, therefore, owed no warranty of seaworthiness to the plaintiff. The court found in the alternative that the Lykes vessels were not unseaworthy and that Lykes was not negligent in its handling of the cargoes of asbestos. Accordingly, the district court entered judgment for the defendant dismissing Castorina's claims with prejudice.

We agree with the district court's conclusion that the LHWCA as amended in 1972 is applicable to the instant suit and that Castorina does not, therefore, have an unseaworthiness claim against Lykes. We therefore find it unnecessary to address the question whether the Lykes vessels on which the plaintiff worked were seaworthy. We also concur with the district court's finding that Lykes was not negligent in failing to protect Castorina from the

hazards of asbestos exposure on Lykes's vessels. We therefore affirm the district court judgment.

II.

Our first inquiry on appeal is whether the law applicable to Castorina's cause of action is the warranty of seaworthiness under the pre-1972 LHWCA or section 905 (b) of the LHWCA as amended in 1972. Castorina, who filed suit under the LHWCA and under general maritime law, asserts that pre-1972 substantive law governs his claims because his exposures to the asbestos dust all occurred before the effective date of the 1972 amendments to the LHWCA. The defendant argues that the controlling date for determining the applicable law for all purposes is not the date of last exposure to the asbestos but the date the asbestosis manifested itself. The district court held that in cases of occupational diseases with long latency periods, the applicable law under the LHWCA is that in effect when the plaintiff is diagnosed as having the disease. Castorina was diagnosed as having asbestosis in 1979. The district court found, therefore, that the LHWCA as amended in 1972 applied to Castorina's claims. We agree.

The 1972 amendments to the LHWCA significantly restricted an injured longshoreman's potential claims against vessel owners. Before the 1972 LHWCA took effect, an injured longshoreman who performed work customarily performed by a seaman had an action against the vessel owner for damages based on the unseaworthiness of the vessel. *Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099. A "*Sieracki* seaman" could recover damages from the vessel owner for breach of its warranty of seaworthiness and could re-

ceive worker's compensation payments from his employer, the stevedore, even when the vessel owner was also the longshoreman's stevedore-employer. *Reed v. The Yaka,* 1963, 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448. In cases in which the unseaworthy condition of the vessel was caused by an independent stevedore's breach of its implied warranty of workmanlike performance to the vessel, the vessel owner was entitled to seek full indemnity from the stevedore for any payment the shipowner was obligated to pay to the injured longshoreman. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.,* 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L.Ed. 133. As a result, an independent stevedore was potentially liable to the injured longshoreman for compensation and to the shipowner for indemnity, despite the provisions of section 905 of the Act, which limited an employer's liability to compensation payments.

In 1972, Congress amended the Act, replacing this "patchwork of overlapping statutory and general maritime remedies" with a "comprehensive remedial scheme between the covered worker, the vessel and the employer stevedore". *Castorina v. Lykes Bros Steamship Co.,* S.D. Tex. 1984, 578 F. Supp. 1153, 1160-61. "The 1972 amendment increased the rate of compensation; provided workers covered by the Act with a negligence action against the vessel, expressly abrogating the warranty of seaworthiness; and abolished the judicially created indemnity cycle between the vessel and the stevedore".[2] *Id.* at 1160 (citations omitted).

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2. 33 U.S.C. § 905(b), added to the LHWCA by the 1972 Amendments, provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof,

[1] Under the LHWCA, the date of injury is used to determine whether pre-1972 or post-1972 law applies to a longshoreman's compensation claims and to third party actions brought under the Act. Before the district court rendered its opinion in the instant case, no court had defined the relevant "date of injury" in third-party long-latency occupational disease cases. In cases involving traumatic injury, the effects of which are most often felt within a short period of time, the date of injury for determining the applicable law under the LHWCA is the date the trauma actually occurred. *See, e.g., Martinez v. Dixie Carriers, Inc.*, 5 Cir. 1976, 529 F.2d 457, 460 n. 1; *McCawley v. Ozeanosun Compania, Maritime, S.A.*, 5 Cir. 1974, 505 F.2d 26, 28. In cases involving occupational diseases that do not immediately result in disability or death, however, it is unclear whether the injury "occurs" when the worker is exposed to the toxic substance (the "time of last exposure" theory) or when the disease actually manifests itself (the "date of manifestation" theory). *See generally Todd Shipyards Corp. v. Black*, 9 Cir. 1983,

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may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

33 U.S.C. § 905(b) (1982) (emphasis added).

717 F.2d 1280, 1288-89, *cert. denied,* ____U.S.____, 104 S. Ct. 1910, 80 L.Ed.2d 459.

In *Harrison v. Flota Mercante Grancolombiana, S.A.*, 5 Cir. 1978, 577 F.2d 968, the plaintiff longshoreman contracted pulmonary fibrosis and emphasema from inhaling a toxic liquid substance that had spilled from a container during stevedoring operations. Although the plaintiff's claims were heard after the effective date of the 1972 amendments to the LHWCA, the court held that pre-amendment law was applicable "because the operative facts giving rise to this suit occurred prior to the effective date of the 1972 amendment[s]". *Id.* at 973 n. 2. In *Harrison,* however, the injury manifested itself shortly after the plaintiff's exposure to the toxic chemical. This case is, therefore, more analogous to the *Martinez* and *McCawley* cases in which a traumatic injury resulted in immediate disability, and is distinguishable from cases involving occupational diseases with long latency periods.

The cases dealing with long-latency diseases such as asbestosis and silicosis have generally held that the date of injury is the date of manifestation of the disease. These cases, however, have typically dealt with determination of the date the statute of limitations begins to run or of the amount of compensation to which the injured worker is entitled. Several courts have held that the statute of limitations for asbestosis and silicosis cases does not begin to run until the disease manifests itself. *See, e.g., Urie v. Thompson,* 1949, 337 U.S. 163, 69 S. Ct. 1018, 93 L.Ed. 1282, which held that a plaintiff's cause of action for silicosis did not accrue until the plaintiff either knew or had reason to know of the disease; *see also Borel v. Fibreboard Paper Products Corp.*, 5 Cir. 1973, 493 F.2d

1076, 1102, one of the first cases to recognize a plaintiff's claims against a manufacturer for asbestosis, which held that a plaintiff's cause of action for asbestosis did not accrue until the disease was discovered or in the exercise of reasonable diligence should have been discovered. More recently, the Ninth Circuit has held that "for the purposes of determining the proper rate of compensation, the time of injury under section 10 of the LHWCA is defined as the date when the occupational disease manifests itself through a loss of wage-earning capacity". *Todd Shipyards Corp. v. Black,* 717 F.2d at 1291. The *Black* court adopted the "time of manifestation" approach rather than the "date of last exposure" approach because it best accomplished the purpose of the LHWCA to compensate injured workers for loss of future earnings. *Id.*

Castorina contends on appeal that *Black* should be limited to its facts and should not be extended to preclude an unseaworthiness remedy for one who was exposed to a toxic agent before 1972 but whose disease did not manifest itself until after 1972. Application of the date of manifestation rule in the instant case, Castorina argues, would result in inequities because a longshoreman suffering traumatic injury before 1972 would be afforded a seaworthiness remedy whereas a longshoreman suffering exposure to toxic materials before 1972 would be afforded the same remedy only if the disease actually manifested itself before 1972. Castorina asserts, therefore, that this court should hold, in accordance with the general rule that doubts should be resolved in favor of the seaman, that the relevant date of injury for determination of procedural and remedial provisions of the LHWCA, such as the running of the limitations period and the proper compensation rate, is the date of manifestation of the injury,

whereas the relevant date of injury for determination of the applicable substantive laws is the last date of exposure.

Lykes counter-argues that in cases of long-latency diseases, the longshoreman's cause of action does not accrue until he is disabled by the manifestation of the disease; therefore, the date of manifestation should be considered the relevant date of injury for determining the applicable procedural and substantive law. The defendant further argues that an injured worker cannot avail himself of the full range of remedies, including increased compensation benefits, afforded by the post-1972 LHWCA without accepting the concomitant restraint on his ability to pursue other remedies expressly precluded by the amendments.

[2] The district court's finding that post-1972 law applies in the instant case is in accord with the rationale behind the 1972 LHWCA amendments as construed by the circuit courts. As noted by the *Black* court, "[i]n cases of occupational diseases with long latency periods, the trend is clearly toward the application of the time of manifestation rule". 717 F.2d at 1290. Further, a worker who is exposed to asbestos or similar fibers does not always contract pulmonary disease. The date of injury, therefore, is most realistically defined as the date that the disease actually manifests itself. This analysis is in keeping with Judge Learned Hand's early decision in *Grain Handling Co. v. Sweeney*, 2 Cir., 102 F.2d 464, *cert. denied*, 1939, 308 U.S. 570, 60 S. Ct. 83, 84 L.Ed. 478: "The [LHWCA] is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself".

Further support for this conclusion is found in the 1984 amendments to the LHWCA, Pub. L. No. 98-426,

98 Stat. 1639 (1984). Section 28(g) of the amendments provides:

> "(g) For the purpose of this section—
>
> (1) in the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the disease. . . ."

Pub. L. No. 98-426, § 28(g)(1), 98 Stat. 1639, 1655. This provision does not relate directly to section 905(b) of the act; however, the legislative history of the amendments demonstrates that Congress expressly rejected the "time of last exposure" approach to determining the date of injury and recognized that it is the disability itself, not mere exposure to a toxic substance, that should trigger an injured worker's rights under the Act. *See* H.R. Rep. No. 98-570, Part I, 98th Cong. 2d Sess. 10, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2743; H.C.R. No. 98-1027, 98th Cong. 2nd Sess. 30, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2771, 2779-2780. Although no such language appears in the 1972 amendments, it is clear that Congress has now adopted the "date of manifestation" approach to determining the date of injury under the Act found applicable by the district court in the instant case.

The district court's holding that Lykes did not owe Castorina a warranty of seaworthiness because Castorina's injury did not occur until after the 1972 amendments to the LHWCA is, therefore, consistent with the majority of judicial authority and with the most current exposition of congressional intent. We affirm that holding.

III.

[3] Having determined that the LHWCA as amended applies to Castorina's claims and that Lykes owed no warranty of seaworthiness to Castorina under the Act as amended, we must now decide whether Lykes is liable to Castorina under section 905(b) of the Act. Section 905(b) expressly provides that a longshoreman whose injury is caused by the negligence of a vessel may bring a third-party action for damages against the owner of the vessel. 33 U.S.C. § 905(b) (1982).[3] "[S]uch a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner." *Jones & Laughlin Steel Corporation v. Pfeifer,* 1983, 462 U.S. 523, ____, 103 S. Ct. 2541, 2547, 76 L.Ed.2d 768, 779. *See also Smith v. M/V Captain Fred,* 5 Cir. 1977, 546 F.2d 119. Under section 905(b), however, "a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity". *Pfeifer,* 462 U.S. at ____ n. 6, 103 S. Ct. at 2547 n. 6, 76 L.Ed.2d at 779 n. 6.

Section 905(b) eliminated a longshoreman's seaworthiness remedy against a vessel and replaced it with a negligence standard; however, it did not specify the particular acts or omissions of a vessel that would constitute negligence. The courts, therefore, were left to grapple with the question of the duty owed by the vessel owner to a longshoreman. In *Scindia Steam Navigation Co. v. De Los Santos,* 1981, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1, the Supreme Court set forth the basic principles governing a vessel owner's duty to a longshoreman employed by an independent stevedore. Before turn-

3. See note 2 and accompanying text.

ing the ship over to the stevedore, the shipowner must "exercis[e] ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property". *Id.* 451 U.S. at 167, 101 S. Ct. at 1622. The vessel owner must warn the stevedore of any hazards with respect to the ship or its equipment of which the shipowner is aware or should by the exercise of reasonable care be aware which would not be obvious to or anticipated by a reasonably competent stevedore. *Id.*

Once the shipowner turns the vessel over to the stevedore and cargo operations begin, the shipowner may rely on the stevedore to discharge his duties in a workmanlike manner, avoiding exposing the longshoremen to unreasonable hazards, without supervision by the ship. *Id.* at 170, 101 S. Ct. at 1624. "[A]bsent contract provision, positive law, or custom to the contrary, . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore". *Id.* at 172, 101 S. Ct. at 1624. The *Scindia* court recognized, however, that the shipowner may have a duty to intervene in cargo operations when it becomes aware of a dangerous condition and the stevedore's continued operations are so "obviously improvident" as to "present an unreasonable risk of harm to the longshoreman". *Id.* at 175-76, 101 S. Ct. at 1626-27.

[4] The Fifth Circuit recently has clarified the precise nature of the shipowner's duty to intervene in cargo operations conducted by an independent stevedore:

> "Once loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on the stevedore to remedy the situation. He is not held to a duty to discover the condition or to anticipate its danger."

Helaire v. Mobil Oil Company, 5 Cir. 1983, 709 F.2d 1031, 1038-39 (emphasis in the original). A shipowner employing an independent contractor to perform stevedoring operations may be held liable to a longshoreman injured during the stevedoring operations, therefore, only when the shipowner has *actual* knowledge both of the dangerous condition and of the stevedore's unreasonable conduct in dealing with the dangerous condition. *Id. See also Duplantis v. Zigler Shipyards, Inc.,* 5 Cir. 1982, 692 F.2d 372, 374; *Hill v. Texaco, Inc.,* 5 Cir. 1982, 674 F.2d 447, 451.

This appeal, however, presents a question heretofore undecided by this court: what duty does a shipowner who conducts its own stevedoring operations have—as shipowner—to protect a longshoreman from unreasonably dangerous cargo operations? We can find no reason to impose on a shipowner a greater duty of care toward longshoremen because the shipowner conducts its own stevedoring operations. In adopting the 1972 amendments to the LHWCA, Congress recognized the need for special provisions to deal with cases in which a longshoreman was employed directly by the vessel. The legislative history of the amendments clearly expresses Congress's intent that an injured longshoreman's remedy be the same whether he is employed directly by the vessel or by an independent stevedore:

> "[T]he bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons."

H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. 118, *reprinted in* 1972 U.S.Code Cong. & Ad.News. 4688, 4705. As discussed in Section I of this opinion,[4] Congress also specifically abolished the judicially-imposed warranty of seaworthiness owed a longshoreman by the vessel and eliminated any indemnity action by a shipowner against a negligent stevedore, so that a stevedore's exclusive liability under the Act is for compensation payments to the longshoreman.[5]

[5] This scheme of compensation requires us to separate the negligence of the shipowner and that of the stevedore, even when the shipowner performs its own stevedoring activities. A shipowner's duty is to provide the stevedore a safe ship and to correct any unreasonably dangerous situation that arises during cargo operations, if the owner is aware of the danger and knows that the stevedore has failed adequately to protect against the danger. *Scindia,* 451 U.S. at 167-70, 175-76, 101 S. Ct. at 1622-23, 1626-27; *Helaire,* 709 F.2d at 1038-39. Only if the shipowner breaches this duty can he be held liable in tort under section 905

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4. See text accompanying note 2.

5. Section 905(a) of the Act provides that "the liability of an employer prescribed in section 904 of this title [liability for compensation] shall be exclusive and in place of all other liability of such employer to the employee. . . ." 33 U.S.C. § 905(a) (1982).

(b) of the LHWCA. The shipowner is otherwise entitled to rely on the stevedore adequately to perform cargo operations and is under no obligation to discover that the stevedore is acting improvidently. *Scindia,* 451 U.S. at 170, 101 S. Ct. at 1623. The longshoreman has no tort remedy against a negligent employer; the employee's sole remedy against the employer is compensation. 33 U.S.C. §§ 904, 905(a).

[6] This specific separation of duties and remedies, detailed in the Act, does not change simply because the shipowner directly employs its own stevedoring personnel. In this situation, the stevedore's knowledge of dangerous conditions that may have arisen during the cargo operations should not be imputed to the shipowner, nor should the shipowner be deemed to know that the stevedore's actions in dealing with such dangers are obviously improvident. To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of sections 905(a) & (b). This result is contrary to the language and purpose of the Act as amended. We therefore hold that the duty owed by a shipowner to a longshoreman under section 905(b) is that established by *Scindia* and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel.

[7] With these principles in mind, we now turn to Castorina's specific allegations of negligence against Lykes. Castorina contends on this appeal that Lykes negligently breached its duty of reasonable care toward Castorina in several respects. First, Castorina contends that Lykes was negligent as shipowner in its method and manner of stowing the asbestos cargo that was delivered

to its stevedoring arm for offloading. Second, Castorina contends that Lykes is liable to Castorina because of the negligently conducted offloading operations carried out by its stevedoring arm. Third, Castorina contends that Lykes was negligent per se in failing to provide respirators to the longshoremen working the asbestos cargo and in allowing the longshoremen to work without respirators.

Castorina asserts that Lykes was negligent in stowing the asbestos cargo in the holds of its ships in loose-weave burlap bags which allowed the asbestos fibers to escape into the air. This practice, Castorina contends, was unreasonably dangerous because Lykes knew or in the exercise of ordinary care should have known that exposure to large amounts of asbestos dust could cause asbestosis and other lung diseases. The district court found that no evidence was presented at trial to support Castorina's allegation that Lykes knew or should have known between 1965 and 1972 of the danger that exposure to asbestos presented to longshoremen. The court concluded, therefore, that Lykes was not negligent; it had exercised ordinary care to make the vessel safe for stevedoring operations.

The district court's findings cannot be set aside unless clearly erroneous.[6] *Cheek v. Williams-McWilliams Co.*,

6. This rule applies both to the court's finding that Lykes did not know nor should it have known of the dangers of asbestos and to its finding that Lykes was not negligent in its stowage or handling of the asbestos cargo, provided that the court employed the correct legal standards as to Lykes's duty of care. Although it did not engage in an extended analysis of a shipowner's duty toward a longshoreman when the shipowner also acts as a stevedore, the court correctly applied the law as set forth in *Scindia* and the cases of this circuit. See *Castorina*, 578 F.Supp. at 1161. Accordingly, we are bound by the clearly erroneous standard.

Inc., 5 Cir. 1983, 697 F.2d 649, 652. Castorina argues that the evidence presented at trial, including the expert testimony of Dr. Hobson, a certified industrial hygienist, safety professional, and licensed engineer, established that Lykes should have known by 1965 that exposure to raw asbestos fibers created an unreasonable risk of harm to the longshoremen. Dr. Hobson testified that the disease of asbestosis was well recognized among research scientists by 1955. His testimony established that by 1935, published studies warned of the dangers to factory workers of continued exposure to high concentrations of asbestos dust. The first study dealing with shipyard workers, who had continued exposure to lower levels of asbestos dust, was published in 1946. This study reported a low incidence of asbestosis among the shipyard workers. Not until 1965 was a study published which warned of serious dangers to shipyard workers continuously exposed to lower levels of asbestos dust. The United States government promulgated no standards for the maximum allowable levels of exposure to asbestos dust until 1970-1971. Nor were there any restrictions or cautionary warnings concerning the carriage of asbestos listed in the Gulf and East Coast South African trade tariffs, United States Coast Guard regulations, or Department of Transportation regulations.

In reviewing this evidence, the district court noted that the reports and studies referred to by Dr. Hobson were not widely circulated and dealt only with workers continuously exposed to asbestos dust. None of the reports or studies examined by Dr. Hobson dealt with intermittent exposures to bagged raw asbestos—exposures such as those to which Castorina was subjected. The court concluded that the evidence was insufficient to show that

Lykes should have known in the years 1965 through 1972 of the dangers of asbestos exposure such as that suffered by Mr. Castorina. Upon a review of this record, we cannot say that we are left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.,* 1948, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746. Accordingly, we uphold the district court's finding that Lykes did not know and should not have known of the dangers of asbestos from 1965 to 1972.

Because Lykes did not know that exposure to asbestos dust created a hazard to longshoremen, it cannot be found liable for stowing the cargo in a manner that allowed the asbestos fibers to escape. "The shipowner's liability for damages arising from a dangerous stow is limited to situations where the shipowner knew or should have known of the dangerous condition." *Harris v. Flota Mercante Grancolombiana, S.A.,* 5 Cir. 1984, 730 F.2d 296, 299 (citation omitted). The district court correctly held, therefore, that Lykes was not negligent in its stowage of the asbestos cargo.

Similarly, Lykes cannot be held liable for permitting stevedoring operations to be conducted in a manner that allowed asbestos fibers to escape into the air. Once stevedoring operations had begun, Lykes was liable for any open and obviously dangerous conditions only if Lykes had knowledge of the danger and that the stevedore would not take adequate precautions to eliminate the danger. *Helaire,* 709 F.2d at 1038-39; *see* p. 1032. Because Lykes was not aware that the asbestos posed a danger to the longshoremen engaged in offloading the cargo, it cannot be held liable for failing to protect against these unknown dangers.

Nor can Lykes be found negligent for failing to provide respirators to the longshoremen working with the asbestos cargo. Title 29, section 1504.102(c)(1) of the Code of Federal Regulations, as amended in 1965, provides: "For protection against pneumoconiosis[7] producing dusts, a respirator equipped with the type of filter provided for such purpose shall be used." 29 C.F.R. § 1504.-102(c)(1) (1965). Castorina contends that this regulation applies to Lykes as the shipowner; that Lykes violated this regulation; and that the violation proximately caused injury to Castorina, one of the intended beneficiaries of the regulation. Castorina concludes that this constituted negligence per se for which Lykes must be held liable in its capacity as shipowner.

This argument fails for several reasons. First, the regulation to which Castorina cites imposes a duty to provide respirators not on Lykes as shipowner but on Lykes as stevedore. Section 1504.2 of the regulations imposes the responsibility for compliance with the regulations on all "employers". An "employer" is defined as "an employer any of whose employees are employed, in whole or in part, in longshoring operations". *Id.* § 1504.3(c). Section 1504.2(b) provides that "[i]t is not the intent of [these] regulations . . . to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters from responsibilities or duties placed upon them by law, regulation or custom." The regulations themselves were promulgated by the Depart-

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7. Webster defines "pneumoconiosis" as a "[d]isease of the lungs caused by the habitual inhaling of minute mineral or metallic particles, as of coal dust in anthracosis, quartz dust in silicosis, etc". Webster's New International Dictionary 1899 (2d Ed. 1958).

ment of Labor under the authority granted it by the LHWCA as amended in 1958, and are designed to require employers to take all reasonable steps to prevent injury to its employees. These regulations should not be viewed, therefore, as placing an additional duty on Lykes as shipowner; rather, they apply to Lykes only in its capacity as an employer.[8]

Nor is Lykes liable as shipowner for failing to step in and halt stevedoring operations when it became aware that the longshoremen unloading the raw asbestos were not wearing respirators or other protective equipment. The plaintiff's witnesses testified at trial that the dusty conditions in the holds of the vessels carrying asbestos were open and obvious to the longshoremen and to the stevedoring crew when they commenced the offloading operations. At that point, Lykes as vessel owner was entitled to rely on Lykes as stevedore to conduct the offloading operations properly. Lykes knew of the dusty conditions and knew that the men were not wearing

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8. Castorina asserts that Lykes should be held liable for violation of the safety regulations under this circuit's decision in *Manning v. M/V Sea Road*, 5 Cir. 1969, 417 F.2d 603. In *Manning*, a case decided before the 1972 amendments to the LHWCA were enacted, a longshoreman sued the vessel owner, who was also the plaintiff's stevedore-employer, for injuries suffered as a result of the unseaworthiness of the vessel. The plaintiff was injured when he stepped on a rotted manhole cover which collapsed, causing the plaintiff to fall into the hold of the vessel. The regulation in question provided that the stevedore must halt operations when manhole openings were unsecured. The court held that the regulation was binding on the vessel in the sense that it was binding on any employer of longshoring employees. The court then found that violation of the regulation made the vessel unseaworthy and that this unseaworthiness was a proximate cause of the injury; therefore, the court held the vessel liable to the plaintiff. The violation itself did not subject the shipowner to liability under a theory of negligence per se; the shipowner was held liable for the unseaworthiness of the vessel, not for violation of the regulation.

respirators.[9] Lykes did not know, however, that this condition was unreasonably hazardous. As shipowner, it had no statutory duty to provide respirators. Moreover, it was entitled to rely on its stevedoring arm to perform the cargo operations properly and had no duty to intervene in the cargo operations which it did not know to be improper. In no case, therefore, can Lykes be held negligent, because it did not know nor should it have known that exposure to asbestos created a hazard to the plaintiff. We therefore affirm the district court's holding that Lykes was not negligent in any manner under section 905(b).

IV.

The district court correctly found for the defendant, Lykes, and properly dismissed Castorina's claims. Because Castorina's asbestosis did not manifest itself until 1979, the LHWCA as amended in 1972 is applicable to this suit. Under that Act as amended, a longshoreman has no unseaworthiness action against the vessel owner. Although a longshoreman may file suit for damages against a negligent shipowner under section 905(b) of the Act, he cannot recover in tort for any injury caused by the stevedoring crew. In cases such as the one before us, in which

9. The district court found that Lykes did provide respirators to the longshoremen. *Castorina*, 578 F.Supp. at 1161. We find no evidence in the record to support this finding. The evidence on the record before us compels us to find that the longshoremen working the asbestos cargoes were not provided with and did not wear masks or respirators when unloading asbestos. The district court's finding to the contrary is clearly erroneous. As demonstrated by our analysis above, however, this constitutes harmless error; Lykes was not bound by the regulation in its capacity as shipowner and was not negligent in failing to stop operations and to require the men to wear respirators because Lykes was under no duty to discover the dangers that asbestos exposure presented to longshoremen.

the injured worker is employed directly by the vessel owner, the worker may recover in tort from the vessel owner only for negligence of the vessel as vessel owner. Because Lykes neither knew nor should have known of the dangers of asbestos exposure, we find that its method of stowing the cargo was not negligent. Nor was Lykes, as shipowner, negligent in allowing Lykes, as stevedore, to conduct the cargo operations as it did. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

Guiseppe CASTORINA, Plaintiff,

v.

LYKES BROS STEAMSHIP CO., INC.,
Defendant.

Civ. A. No. G-80-267.

United States District Court,
S.D. Texas,

Galveston Division

January 12, 1984.

Longshoreman who contracted asbestosis, allegedly as a result to exposure to asbestos while unloading vessels, brought cause of action pursuant to Longshoremen's and Harbor Workers' Compensation Act and general maritime law against vessel owner to recover for injuries. The District Court, Hugh Gibson, J., held that: (1) where vessel owner did not and could not have known of dangers of asbestos packed in burlaps bags during time of exposure to longshoreman involved in unloading cargo, and vessel owner had complied with federal regulations pertaining to carriage of asbestos, vessel owner was not negligent in any manner under Longshoremen's and Harbor Workers' Compensation Act, and (2) where longshoreman's injury, the contraction of asbestosis, was caused by dangerous nature of asbestos cargo, which had been shipped in full accordance with Coast Guard regulations, longshoreman could not recover from vessel owner even if longshoreman could have asserted claim for unseaworthiness.

Order accordingly.

Stephen M. Vaughan, Mandell & Wright, Houston, Tex., for plaintiff.

James R. Watkins, Royston, Rayzor, Vickery & Williams, Galveston, Tex., for defendant Lykes Brothers Steamship Co., Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HUGH GIBSON, District Judge.

Plaintiff brought this cause of action pursuant to 33 U.S.C. § 905(b) and the general maritime law to recover for injuries sustained as a result of exposure to asbestos. All defendants and third parties in this case, other than Lykes Bros. Steamship Co., Inc. (hereinafter "Lykes"), settled or have been dismissed for lack of evidence that plaintiff handled asbestos on the named vessel or for the named stevedore. Lykes' third party actions against Egnep, (Pty), Ltd., General Mining, and Cape Asbestos have been severed from this action. A default judgment has also been entered as against Cape Continent Shipping Co. for failure to answer. This case was tried to the Court without a jury March 21-25, 1983. The Court, after considering the evidence and legal issues presented, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Guiseppe Castorina is a 63-year-old longshoreman who has worked on the Galveston docks from 1955 to the present through ILA local #307, and, in earlier years, ILA local #1576. From 1965 to 1972 plaintiff worked on numerous vessels, including those owned by Lykes, discharging raw asbestos packaged in burlap bags.

2. At all times material hereto, defendant Lykes was and is a Louisiana corporation, with its main office and principal place of business in New Orleans, Louisiana. Defendant was the owner and operator of the vessels MARGARET LYKES, STELLA LYKES, JAMES McKAY, LETICIA LYKES, SUE LYKES, WILLIAM LYKES, KENNETH McKAY, RUTH LYKES, GIBBES LYKES, AIMIE LYKES, and CHARLOTTE LYKES.

3. From 1965 to 1972 Lykes transported asbestos in burlap bags from South Africa to the Port of Galveston in the above named vessels, among others. Lykes provided the stevedoring services to these vessels through its own in-house stevedoring division.

4. According to plaintiff's testimony, he worked on numerous vessels discharging asbestos but could only specifically remember working on Lykes ships. In matching the records of the Galveston Wharves indicating the dates of Lykes vessels discharging asbestos, with plaintiff's work records indicating the dates plaintiff worked and for what employer, the Court adduces that the following are the dates of plaintiff's possible exposure:

Date	Vessel
3/14-18/65	MARGARET LYKES
3/22-23/66	STELLA LYKES
5/15/66	JAMES McKAY
6/27/66	LETITIA LYKES
12/ 8/67	SUE LYKES
1/12/68	WILLIAM LYKES
1/31-2/ 1/68	KENNETH McKAY
5/ 7- 8/68	STELLA LYKES
7/ 4/68	CHARLES LYKES
11/13-14/68	RUTH LYKES
9/23/69	GIBBES LYKES

Date	Vessel
12/ 7/70	WILLIAM LYKES
9/25/71	AIMEE LYKES
3/24/72	AIMEE LYKES
5/ 5/72	CHARLOTTE LYKES

5. Plaintiff and other longshoreman testifed that the manner of stowage of the asbestos in loose-weave burlap bags in the holds of these vessels was such that, when the longshoremen would open a hatch to go into the hold, they would find raw asbestos loose in the holds, and would occasionally find torn bags of asbestos. In the course of offloading, the bags would be tossed around, would fall out of the slings or nets used to discharge them, would be torn by cargo hooks, and would otherwise be struck or jostled in such a way as to cause asbestos dust to escape from the burlap bags into the atmosphere.

The dust became so pervasive that at times it would cause clouds of asbestos in the holds of the vessels. The sun would show the particles in the atmosphere as it streamed in through the hatchway. The asbestos would cling to the bodies and clothing of the longshoremen to such an extent that they would occasionally have to wipe their mouths, expectorate, or take a drink of water to clear their mouths and throats of the asbestos. Some longshoremen would wet a handkerchief and tie it around their mouths to help filter out some of the asbestos.

When the asbestos bags were set down on the wharf, three of the four corners of the net would be disconnected from the crane, and the fourth corner raised in such a way as to dump the bags onto the wharf. This process, as well as the process of stacking the bags onto pallets, caused asbestos to escape into the atmosphere where the men were working.

After the asbestos was discharged, a longshore gang would go aboard the vessel to clean out the holds. Sometimes the loose asbestos to be cleaned out of the hold would be several inches deep. These longshoremen swept the asbestos from the sides and floors of the holds, putting it into barrels, which in turn were removed from the vessels. This process likewise stirred up the asbestos.

At trial plaintiff testified that he worked all of the above-described cargos on one or more occasions. The Court finds that plaintiff was exposed to and did inhale large amounts of asbestos while working on Lykes vessels.

Plaintiff, other longshoremen and Lykes employees testified that respirators were supplied to the longshore gangs. The longshoremen did not use the respirators because they interferred with vision and were hot and bulky to wear. Most testified that cloth or paper masks would have been more useful.

6. The medical testimony at trial showed that as a result of plaintiff's exposure and inhalation of asbestos dust, he now suffers from asbestosis.

Plaintiff's medical history reflects that he was a two-to-three-pack-a-day smoker for 26 years. In approximately 1969 plaintiff quit smoking. In the spring of 1975, plaintiff was treated by Dr. H. B. Kelso, Jr., for wheezing in the left side of his chest. X-rays taken in St. Mary's Hospital in Galveston on April 18, 1975, showed an area of dense infiltrate in the anterior aspect of the right middle lobe and repeated chest x-rays showed persistence of this abnormality. While in the hospital, plaintiff had chest discomfort, especially when lying flat. On October 19, 1976, plaintiff was treated for increased shortness of breath on exertion and told Dr. Kelso that "the shortness of breath

has reached the point where it is interfering with my work." On October 22, 1976, the chest x-ray film revealed a "rather marked degree of pleural thickening at both bases" of his lungs, and Dr. Kelso recommended to plaintiff that he be admitted to the hospital for further workup which plaintiff refused.

Medical testimony presented at trial showed that the conditions found by Dr. Kelso were manifestations of asbestosis. In 1979, plaintiff was diagnosed by Dr. F. J. Zaunbrecher as suffering from asbestosis. This lawsuit was filed in 1980.

7. Between 1965 and 1972, Lykes carried the cargoes of asbestos from South Africa to Galveston, Texas, as a common carrier, pursuant to the terms and conditions of its membership in the South & East African Conference. Under the terms and provisions of the tariff set by the Conference for its northbound freight traffic, its members were required to accept cargo in South Africa packaged in conformity with the rules and regulations of the United States Coast Guard and the Department of Transportation, providing that such cargo was not listed as dangerous or hazardous.

As a common carrier, Lykes was regulated by the Shipping Act, 46 U.S.C. § 801, *et seq*. Common carriers are required to file tariffs with the Federal Maritime Commission and are only allowed to enter into shipping conference agreements approved by the Federal Maritime Commission. 46 U.S.C. §§ 814 and 817. Common Carriers are subject to monetary penalties for discriminatory shipping practices. 46 U.S.C. § 815. A common carrier may not refuse to carry the goods of a qualified shipper.

8. Between 1965 and 1972, asbestos was routinelv and regularly shipped from South Africa to the United States in burlap sacks. Asbestos in burlap sacks was not listed as dangerous or hazardous cargo by the tariff, the United States Coast Guard, or the Department of Transportation. The evidence adduced at trial showed that Lykes carried asbestos cargos in conformity with all shipping regulations.

9. Plaintiff's industrial hygienist testified that in 1965 it was known that exposure to asbestos could cause asbestosis, mesothelioma and other related lung disorders. The reports, journals and texts he referred to dealt with workers continuously exposed to asbestos when bags were being poured into hoppers, when asbestos was being woven into fabric or manufactured into products, and when asbestos insulation was being installed into ships. These articles appeared in scientific and medical journals. None of these reports were widely circulated nor did they appear in any journal or test which carriers would have consulted for guidance as to the safety of individuals handling cargo. None of these articles addressed the handling of bagged raw asbestos or intermittent exposure. No evidence was adduced at trial that Lykes officers knew or should have known of the danger of asbestos from 1965 to 1972.

CONCLUSIONS OF LAW

1. This action is within the Court's admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1331.

2. Plaintiff has brought this cause of action for recovery under two theories: negligence and breach of the warranty of seaworthiness. Defendant urges that defend-

ant was not negligent in its operations; that plaintiff's claim is barred by laches; that post-1972 LHWCA is applicable; and that the causative defect resulting in plaintiff's injury was an unknown defect in cargo and not a defect in the packaging, stowing, or unloading of cargo.

[1, 2] 3. In applying the doctrine of laches to asbestos cases the analogous two-year limitation period begins to run at the time plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his injury. *Fusco v. Johns-Manville Products Corp.*, 643 F.2d 1181, 1183 (5th Cir. 1981). *See Eagle-Picher Industries v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981); *See also Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L.Ed. 1282 (1949) (statute of limitations for silicosis does not begin to run until the disease manifests itself). Generally, the date of discovery coincides with the date of diagnosis. *Fusco, supra*. Under federal law, "[A] cause of action does not arise until the plaintiff can first successfully maintain suit on that cause of action." *Bellamy v. United States*, 448 F.Supp. 790, 793 (S.D. Tex. 1978). Logically, plaintiff could not successfully maintain a suit prior to the date of diagnosis. While diagnosis of the disease need not be "medically confirmed," it is necessary that plaintiff be apprised by some trained individual that he has, or may within reasonable probability have, asbestosis. *See Fusco, supra*, where the court found that plaintiff received sufficient notice when he was informed by an industrial safety engineer that his examination and diagnosis indicated that he had asbestosis. *See also Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 113-17 (D.C. Cir. 1982) where the court found that diagnosis of mild

asbestosis in 1973 did not trigger running of statute of limitation on separate, distinct, later-manifested mesothelioma, engendered by the same asbestos exposure.

Plaintiff in this case consulted a physician for pulmonary dysfunction in 1975 and 1976, but was not diagnosed as having asbestosis until 1979. On all occasions plaintiff's symptoms were consistent with asbestosis. In 1976 plaintiff's doctor did urge him to submit to further testing which might have led to a diagnosis of asbestosis, but plaintiff refused to be hospitalized.

[3, 4] The Court concludes that plaintiff was not apprised of his condition until 1979 and filed this action within the analogous two-year period of limitation. In considering the equitable issues of laches, the Court further concludes that if plaintiff should have in the exercise of reasonable diligence, discovered his injury in 1976, the defendant was not prejudiced by the time of the filing of this suit.

4. During the pendency of this case the Court denied third-party defendant Gulf Stevedoring's motion for dismissal, citing *Harrison v. Flota Mercante Grancolombiana*, 577 F.2d 968, 793 n. 2 (5th Cir. 1976). In their motion, Gulf urged that this cause of action arose after 1972 and § 905(b) of LHWCA barred cross-plaintiff from seeking indemnity from the longshoreman's employer. *See Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1032 (5th Cir. 1977) for discussion of the effect of the 1972 amendments of the LHWCA. The Court, in its order dated July 30, 1982, ruled that in this case, like *Harrison*, "the operative facts occurred prior to 1972, and hence, pre-amendment law applies, and third-party plaintiff may seek indemnity from third party defendant."

In *Harrison,* the plaintiff, a longshoreman, was exposed to liquid chemical isobutyl acrylate when it spilled in the hold. Plaintiff's injury was traumatic in nature as opposed to one arising from an occupational disease. Harrison immediately experienced burning eyes, sore throat, skin irritation, a headache, but he continued to work for five to six weeks during which time his condition worsened. He became seriously ill and was totally disabled.

At trial in 1976, Harrison asserted an unseaworthiness claim against the vessel. The court found the plaintiff's action and the vessel owner's cross action for indemnity from the stevedore were proper because the operative facts giving rise to the suit occurred prior to the effective date of the 1972 amendments. 33 U.S.C. § 905.

[5] Defendant distinguishes the case at bar from *Harrison* in that the damages arising from this plaintiff's exposure to asbestos did not arise until after the 1972 amendments. Under the LHWCA, the date of injury is used to determine whether pre- or post-1972 amendment law applies for both compensation claims and third party actions.[1] *See Director, Office of Worker's Compensation Programs, Department of Labor v. Hernandez,* 588 F.2d

1. Pre-amendment longshoremen within the Act, and post-amendment longshoremen not covered by the Act, are governed by the general maritime law. They are seamen pro hac vice entitled to the warranty of seaworthiness. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 99, 66 S. Ct. 872, 879, 90 L.Ed. 1099 (1946); *see Aparicio v. Swan Lake,* 643 F.2d 1109, 1113-15 (5th Cir. 1981). Post-1972 amendment third-party causes of action against vessels by covered workers arise out of, are authorized, and limited by the Act. *Id.* As part of the 1972 amendments to the LHWCA, Congress enacted section 905(b), "providing a person covered by the Act with a negligence action against the vessel, expressly abrogating the 'warranty' of seaworthiness and specifically prohibiting the vessel's attempts to seek indemnity from the stevedore employer." *Id.*

173 (5th Cir. 1979). The defendant urges that the "date of injury" in asbestosis cases should be the date of manifestation as opposed to the date of last exposure.

[6] No method has yet been prescribed for computing the date of injury in third party long-latency occupational disease cases. The Fifth Circuit has not rendered any opinion indicating whether the date of injury for compensation claims or third-party actions in asbestos cases is the date of last exposure or the date of manifestation of the disease. Fixing the date of injury at the time of the operative facts, under *Harrison,* seems to indicate the date of last exposure is applicable. However, the factual basis and legal argument which support *Harrison,* a traumatic injury case, are distinguishable from occupational disease cases. The circumstances of the date of injury in the asbestosis cases and in other occupational disease cases are inherently different from those in traumatic injury cases.

The Deputy Commissioners in this district at the order of the Assistant Director of Longshore and Harbor Workers' Compensation,[2] is currently applying in as-

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2. A LHWCA circular dated June 7, 1983, from Neil A. Monte to all regional administrators, assistant regional administrators, assistant deputy commissioners and national office staff states in pertinent part:

> On May 23, 1983, the U.S. Court of Appeals for the Ninth Circuit issued its long awaited decision in *Todd Shipyards v. Gerald Black and Director, OWCP.*
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> . . . .
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> The Court clearly rejected the Board's rationale in *Dunn v. Todd Shipyards,* 13 BRBS 647. The *Dunn* decision is described as "ill considered and contrary to the express purpose of the LHWCA . . ."
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> In addition, the Court advised that the time of manifestation theory is far more likely to insure that injured workers will be fairly compensated for their future earning capacity. The Court

bestosis cases the date of manifestation theory, as stated in *Todd Shipyards v. Black,* 717 F.2d 1280 (9th Cir. 1983).[3] The Ninth Circuit, in *Todd Shipyards Corp. v. Black,* held that, "compensation under the Act must be computed based on the date [that the] injury manifested." *Id.* at 1289. The BRB in the Ninth Circuit had, prior to *Dunn v. Todd Shipyards Corp.,* 13 Ben. Rev. Bd. Serv. 647 (1981), applied the date of manifestation theory. The Benefits Review Board (BRB) reversed itself in *Dunn* and adopted the last date of exposure rule. *Dunn* was cited by the BRB in applying the last date of exposure rule in the administrative hearing of *Todd Shipyards Corp. v. Black, supra.* On review of the BRB decision in *Todd Shipyards v. Black,* the Ninth Circuit Court of Appeals held that the last date of injury in asbestos cases was "completely contrary to the express purposes of the LHWCA." *Id.*[4]

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thus rejected the date of last exposure theory for determining average weekly wages.

. . . .

The Director, OWCP is in agreement with the decision and the decision is to be applied by all Deputy Commissioners.

3. While deference is given an administrative agency's interpretation of mixed questions of law and fact, particularly where the understanding of the problem is enhanced by the agency's expert understanding of the industry, "this deference to an administrative agency's decisions on questions of law is not conclusive." *Coca-Cola v. Atchison, Topeka & Santa Fe Ry. Co.,* 608 F.2d 213 (5th Cir. 1979). Accordingly, the Court does not find the agency's interpretation binding but does give it significant consideration.

4. *See also* Perkins, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1983, H.R. Rep. No. 575, 98th Cong., 1st Sess. (1983) which notes that the Committee on Education and Labor "specifically rejects the Benefits Review Board decision in *Dunn v. Todd Shipyard. Id.* at 12. The Committee proposes to adopt the date of manifestation rule for occupational disease cases with long latency periods. *Id.* at 10-12. Two dates of "manifestation" are proposed and applicability would depend upon whether the worker

Black worked for Todd Shipyards as a welder from 1942 to 1945. During his employment he was exposed to large doses of asbestos. In 1977 Black underwent surgery to remove the upper lobe of his right lung because of a squamous cell carcinoma. While recovering from surgery Black was examined and diagnosed as having asbestosis.

The appellate court in *Black* examined the common sense meaning of "injury" and the usage of "injury" in Section 910 of the Act. Quoting *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 466 (2d Cir.), *cert. denied*, 308 U.S. 570, 60 S. Ct. 83, 84 L.Ed. 478 (1939), the court held, "a disease is no disease until it manifests itself." *Id.* An average person would not consider himself injured because he was exposed to a potentially dangerous substance but rather would consider himself injured when the substance cause a dysfunction. Most urban dwellers are exposed to the various substances which cause occupational diseases. Many of these exposures cause no discernible harm. In asbestosis and silicosis cases 20 or more years may elapse before a harmful exposure results in any manifestation of disease.

[7] In discussing both compensation law and general tort law, the Ninth Circuit concluded that "[i]n cases of occupational diseases with long latency periods, the trend is clearly toward the application of the time of manifestation rule." *Id.* at 1290, citing *Wilson v. Johns-Manville Sales Corp., supra.* This Court concurs in that conclusion and adopts the time of manifestation as the

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was currently employed or retired. The date of injury for those who are employed is defined as the date which the occupational disease manifests itself through loss of wage earning capacity. Retired persons would become disabled at the date of impairment of functional capacity. *Id.* at 11.

"date of injury" for purposes of LHWCA third-party asbestosis actions.

[8, 9] 5. The last date of exposure is, however, plausible as the date of injury under equitable theories. First, seamen are the wards of the court in admiralty, and great deference is afforded to them in protecting and liberally construing their rights. *Seas Shipping Co. v. Sieracki, supra* at 91-92 n. 9, 66 S. Ct. at 875-876 n. 9; *The State of Maryland,* 85 F.2d 944, 945 (4th Cir. 1936). Asbestos has a latency period of 10 to 20 years. Plaintiff in this instance was exposed, as evidenced by his work history and the circumstances of his medical condition, prior to 1972. Plaintiff, as a seaman pro hac vice under pre-'72 amendment law, was entitled to the warranty of seaworthiness. *Seas Shipping v. Sieracki, supra.*

The Fifth Circuit considered an analogous situation when it examined the anomalies between the general maritime remedies and statutory seamen's remedies. *Smith v. Ithaca Corp.,* 612 F.2d 215 (1980). Smith, a seaman, suffered a heart attack as a result of benzine exposure. Forty-one of the 161 days Smith was aboard the S/S V.A. FOGG, the vessel carried benzine cargo. The evidence showed that benzine fumes permeated the crew's quarters and that Smith's exposure to the fumes aggravated his pre-existing heart condition. Smith was exposed to the fumes in port, in state territorial waters, and at sea. He died shoreside two days after he was discharged from the vessel.

Smith's widow initiated suit in the Death on the High Seas Act, 46 U.S.C. § 761-768, the Jones Act, 46 U.S.C. § 688, and the general maritime law. The district court awarded plaintiff damages for loss of society. Non-pecuniary damages are not recoverable under the Jones

Act or DOHSA, but are recoverable under the general maritime law. The Fifth Circuit held that

> when a seaman dies of an indivisible injury which is caused in part by unseaworthiness and inflicted over a period during which the vessel which he is a member of the crew cruised coastal waters and the high seas, the seaman's survivors may recover damages for loss of society under the general maritime law in addition to any damages recoverable under the Jones Act of DOHSA.

Id. at 226. *See Hlodan v. Ohio Barge Lines, Inc.*, 611 F.2d 71 (5th Cir. 1980). The Fifth Circuit accorded the plaintiff the full benefit of the anomalies between the remedies where recoverability was shown under each.

The remedies arising under the post-'72 amendment LHWCA differ substantially from the panoply of seamen's remedies. The post-'72 LHWCA is a complete statutory remedial scheme, wholly unlike the patchwork of overlapping statutory and general maritime remedies availed to the seaman. The 1972 amendment increased the rate of compensation; provided workers covered by the Act with a negligence action against the vessel, expressly abrogating the warranty of seaworthiness; and abolished the judicially created indemnity cycle between the vessel and the stevedore. *Aparicio v. Swan Lake,* 643 F.2d 1109, 1113-15 (5th Cir. 1981). As such, the post-'72 statute comprises a comprehensive remedial scheme between the covered worker, the vessel and the employer stevedore. No remnants of the general maritime *Sieracki* seaman's status remain for workers covered by the LHWCA Act.

[10] In applying the statutory scheme of the Act, the court should be constrained to follow the black letter

law of the statute enforcing the intent of Congress as codified. The Fifth Circuit specifically held in *Aparicio* that "the statute itself must be our polestar" in construing the remedies and limitation of the LHWCA. 643 F.2d at 1116. The Court therefore concludes that plaintiff's equitable arguments are without merit. Accordingly, the Court having found that plaintiff's effective date of injury was the date of manifestation diagnosis, concludes that plaintiff's action is governed and limited by 33 U.S.C. § 905 (b).

[11, 12] 6. Under post-1972 LHWCA law, a vessel owner owed a duty to the longshoremen to exercise ordinary care, prior to the commencement of cargo operations, to make that portion of the vessel to be used by the stevedore reasonably safe for the operations of a competent, expert stevedore performing in a reasonably safe manner, and to warn the stevedore of any latent dangers which the vessel interest was or should have been aware of. *Scindia Steamship Navigation Co. v. De Los Santos,* 451 U.S. 156, 157, 101 S. Ct. 1614, 1616, 68 L.Ed.2d 1 (1981). The vessel owner has no duty to inspect or supervise stevedoring operations, *Id.* 167-170, 101 S. Ct. at 1622-1623, and only has a duty to intervene if he has knowledge of a dangerous condition and of the stevedore's unreasonable conduct in continuing operations. *Duplantis v. Zigler Shipyards,* 692 F.2d 372 (5th Cir. 1982); *Pluyer v. Mitsui O.S.K. Lines,* 664 F.2d 1243 (5th Cir. 1982).

[13] The Court having previously found the defendant did not and should not have known of the dangers of asbestos packed in burlap bags during the time of plaintiff's exposure, and that defendant complied with federal regulations pertaining to the carriage of asbestos, con-

cludes that defendant was not negligent in any manner under section 905(b).

7. The Court further concludes that even if plaintiff could assert a claim for unseaworthiness, the evidence presented at trial is insufficient to support a finding of liability.

[14-17] The warranty of seaworthiness is not an unconditional warranty of safety but is a warranty of fitness for duty. *Smith v. American Mail Line,* 525 F.2d 1148 (9th Cir. 1975). This warranty extends to the fitness of the ship appurtenances. *The OSCEOLA,* 189 U.S. 158, 23 S. Ct. 483, 47 L.Ed. 760 (1903), crew, *Smith v. American Mail Line, supra,* method of cargo stowage. *Ryan v. Pacific Coast Shipping Co.,* 509 F.2d 1054 (9th Cir. 1975), and cargo containers, *Gutierrez v. Waterman S.S. Corp.,* 373 U.S. 206, 212-13, 83 S. Ct. 1185, 1189-90, 10 L.Ed.2d 297 (1963), but not to the cargo itself, *Smith v. American Mail Line, supra* at 1150; *see Morales v. City of Galveston,* 370 U.S. 165, 82 S. Ct. 1226, 8 L.Ed.2d 412 (1962); *Bell v. Nihonkai Kisen K.K. Tokyo,* 204 F.Supp. 230 (D.C. Or. 1962). To constitute an unseaworthy condition, the defect must be in the ship's hull or gear or stowage. *Grillea v. United States,* 232 F.2d 919, 922 (2d Cir. 1956). Since cargo has never been considered an integral part of a vessel, an inherent vice, defect, or the dangerous nature of cargo will not render a vessel unseaworthy. *Bell v. Nihonkai Kisen K.K. Tokyo, supra* at 233.

The issue presented here is whether asbestos cargo packaged in burlap bags, if presumed "defective," is defective because of its packaging or because of the inherent nature and properties of asbestos. The question is complicated by the finding that at the time of plaintiff's

exposure, defendants did not know of the danger to longshoremen exposed to asbestos in the manner and with the frequency that plaintiff was exposed. Assuming that packaging asbestos in triple plastic wraps cures the problem of exposure, the question of whether the package or the cargo was "defective" during the period of plaintiff's exposure remains unresolved, as knowledge of the danger is required to afford protection.

A fine distinction is drawn between cargo and packaging. In *Bell v. Nihonkai Kisen K.K. Tokyo, supra,* a log, with a preexisting latent defect, broke in two while being lifted by ship's tackle. A piece of the log fell into the hold striking the plaintiff, a longshoreman. The Court found that the injury was caused by a defect in cargo and refused to extend the warranty of seaworthiness.

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed.2d 798 (1962), where a longshoreman was injured when the steel bands around a bundle of burlap broke, the bundles of burlap were discharged by placing a hook under two of the four steel bands. When the load was lifted, the remaining two bands broke and the bundle hit the plaintiff.[5]

The *Bell* court distinguished its holding from *Ellerman* by pointing out that the stevedore in *Ellerman* used the bands instead of a sling to discharge the cargo. The bands therefore became ship's tackle, an appurtenance of the vessel. *Id.* at 233-34. The log in *Bell* was simply cargo and the vessel does not warrant that cargo will be safe to handle. *Id.* at 233.

[18] A vessel owner need not have any type of knowledge of a packaging defect to be liable for unseaworthi-

5. The issue of unseaworthiness was not involved in the appeal to the Supreme Court.

ness. *Gutierrez v. Waterman, supra* at 213, 83 S. Ct. at 1189, *Simpson Timber v. Parks,* 390 F.2d 353 (9th Cir. 1968); *Reddick v. McAllister Lighterage Line, Inc.,* 258 F.2d 297, 299 (2d Cir. 1958). In *Simpson Timber v. Parks,* a longshoreman was injured when he stepped through the packaging on a bundle of doors. The Second Circuit upheld the jury finding that the vessel was unseaworthy despite the fact that the shipowner neither knew nor, in the exercise of reasonable care, could have known of the dangerous condition and the fact that the dangerous condition was created solely by the manufacturer's wrongdoing. *Id.* at 355.

The holding in *Parks* is distinguishable from *Bell,* in that *Bell* deals with the inherent safety of the cargo and *Parks* deals with the manner in which cargo has been stowed and thereafter utilized in such a manner as to imperil the safety of the seamen. Only in the latter instance does the warranty of seaworthiness come into full bloom. *Bell, supra* at 233. The package in *Parks,* like the unstable truck chassis in *Rich v. Ellerman & Bucknall S.S. Co.,* 278 F.2d 704 (2d Cir. 1960), the crate in *Reddick, supra,* and the hatch cover in *Grillea, supra,* had become "as much a part of the 'tweendeck for continued prosecution of the work as though it had been permanently fixed in place." *See Id.* at 923; *Bell, supra* at 232-33.[6]

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6. *See also Gutierrez v. Waterman, supra,* where vessel accepted torn bags of beans. When discharged, the bean sacks broke and beans were scattered on the pier. Plaintiff slipped and fell injuring himself. The Supreme court upheld the finding of unseaworthiness, stating "[A] ship that leaks is unseaworthy; so is a cargo container that leaks. When the shipowner accepts cargo in a faulty container or allows the container to become faulty, he assumes the responsibility for injury that this may cause to seamen or their substitutes on or about the ship." *Id.* 373 U.S. at 213-14, 83 S. Ct. at 1189-90.

[19] A vessel owner does have a duty, however, to warn a stevedore or take reasonable precautions against known or reasonably foreseeable defects in cargo. *See Morales v. Galveston,* 370 U.S. 165, 171, 82 S. Ct. 1226, 1230, 8 L.Ed.2d 412 (1962). This duty does not extend the warranty of seaworthiness to cargo. *Smith v. American Mail Lines, supra* at 1150. A vessel owner could be shown to be liable under an ordinary standard of negligence for failure to warn of such a known defect. *See Jones v. Laughlin Steel,* ____U.S.____, 103 S. Ct. 2541, 76 L.Ed.2d 768 (1983) where the Supreme court, citing *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 549-50, 80 S. Ct. 926, 932-33, 4 L.Ed.2d 941 (1960) indicates the availability of a negligence remedy for an injured longshoreman against the vessel owner under pre-1978 amendment law, "even if the [unseaworthy] condition was not attributable to negligence by the owner." 103 S. Ct. 2547 n. 7 action under the general maritime law.

In *Harrison v. Flota Mercante Grancolombiana,* 577 F.2d 968 (5th Cir. 1978), the court in applying pre-1972 amendment law found the vessel unseaworthy when barrels of liquid chemical isobutyl acrylate (IBA) cargo with defective warning labels were ruptured while being loaded. When the load was lifted, the winch slipped. Two barrels fell and hit a third, rupturing all three. Plaintiff assisted cleaning up the IBA that spilled in the hold. As a result of his exposure to the fumes and the liquid, plaintiff over a period of time became totally disabled and now suffers from diffuse pulmonary fibrosis and emphysema. The dangers of exposure to IBA were generally known at the time of the accident. The label on the barrels did not have an adequate warning of the dangers of IBA. The

package was therefore defective. The vessel was rendered unseaworthy because of the packaging defect.[7]

The case at bar is most analogous to *Morales v. City of Galveston, supra.* In that case grain was being loaded in bulk.[8] The last shot of grain was improperly fumigated and Morales, a longshoreman, was injured by fumes when the grain was released into the bin. Evidence adduced at trial showed that the grain was copiously tested by the elevator, under government authority, when the grain was received and disbursed. These tests failed to detect the remaining noxious chemicals.

The vessel was found to be seaworthy as "the cause of injury was not any defect in the ship but the fact that the last shot of grain which was being loaded was contaminated." *Morales v. City of Galveston,* 291 F.2d 97, 98 (5th Cir. 1961). Although the plaintiff argued that the vessel was unseaworthy for failure to equip the cargo

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7. Although the vessel was unseaworthy, the district court assessed liability solely against the defendant manufacturer because it found that neither the vessel nor the stevedore was actively negligent and that the active negligence of the manufacturer was the cause of plaintiff's injury. The court of appeals held that the finding of the trial court that the stevedore was not actively negligent was clearly erroneous and remanded the case for further findings.
See Martinez v. Dixie Carriers, Inc., 529 F.2d 457 (5th Cir. 1976). Martinez was injured by benzine fumes while attempting to strip the tanks of a barge. During trial the court indicated that the barge was unseaworthy "because of the negligent manner in which the stripping was conducted and because of the failure to provide adequate warning of the nature of cargo." *Id.* at 467. The Fifth Circuit noted that, "[W]e do not regard DuPont's alleged failure to warn as a source of the barge's unseaworthiness." *Id. See also Gutierrez v. Waterman, supra.*

8. As noted by the Supreme Court in *Gutierrez v. Waterman,* "Morales, of course, did not involve the unseaworthiness of cargo containers, but rather that of the ship's hold." *Id.* 373 U.S. at 213 n. 4, 83 S. Ct. at 1190 n. 4.

spaces with forced ventilation, the Supreme Court upheld the seaworthiness and pointed out that the injury was solely caused by "the isolated and completely unforeseeable introduction of a noxious agent from without." 370 U.S. at 171, 82 S. Ct. at 1230.[9] The dissenting justices disputed the unforeseeability of the accident as three or four similar accidents occurred in Galveston between 1949 and 1953. *Id.* at 171-72, 82 S. Ct. at 1230-31.

[20] In the case at bar, plaintiff's injury was caused by the dangerous nature of the asbestos cargo. Asbestos cargo, like grain, corn, flour and other commodities, was shipped in burlap sacks, in full accordance with the Coast Guard regulations. But for its unknown properties, this method of packaging was wholly adequate. Plaintiff's injury did not arise from his slipping and falling in loose asbestos, as in *Gutierrez v. Waterman S.S. Co., supra,* and *Hagans v. Ellerman & Bucknall S.S. Co.,* 318 F.2d 563 (3rd Cir. 1963);[10] or from the method of stowing and unloading the cargo, as in *Hroncich v. American Presi-*

---

9. The district court reasoned that,

> . . . While the Grelmarion's cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary. . . .
>
> The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the Grelmarion to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect. 181 F.Supp. 202 at 206, 207.

10. Hagans slipped on sand that spilled from broken bags of cargo.

dent Lines, 334 F.2d 282 (3rd Cir. 1964);[11] or from the lack of adequate warning of a known danger, as in *Martinez v. Dixie Carriers, supra;* but from inhaling fibers that, at the time, were not known to be toxic.

The danger emanated solely from the unknown properties of the cargo itself and not from any defect within the hull, appurtenances, or crew of the vessels. The Lykes Brothers ships that plaintiff worked aboard were seaworthy. The danger, as in *Morales*, was an unforeseeable noxious agent introduced from without.

8. Accordingly, the Court finds for the defendant and against the plaintiff.

9. If any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. If any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

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11. Hroncich was injured while unloading bales of rubber. The longshoremen were separating the rubber bales that were stuck together when a vertical column of the stacked bales fell. One of the bales that fell bounced and struck plaintiff.

APPENDIX C

Statutes and Regulations

Section 5 (b), 29 U.S.C. § 905 (b) (1978):

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Section 10 (i), 33 U.S.C. § 910 (i) (Supp. 1985):

For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed

to be date in which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advance should have been aware, of the relationship between the employment, the disease, and the death or disability.

29 C.F.R. § 1504.2 (1965):

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in Section 1504.3(c).

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

29 C.F.R. 1504.102 (c)(1) (1965):

For protection against pneumoconiosis producing dusts a respirator equipped with the type of filter provided for such purpose shall be used.

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Supreme Court, U.S.
FILED
AUG 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GUISEPPE CASTORINA,
Petitioner

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

PARENT COMPANY

Lykes Bros. Steamship Co., Inc.'s parent company is Interocean Steamship Corp.

STATUTES

Longshoremen's and Harbor Workers' Compensation Act
33 U.S.C. § 905(a):

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Longshoremen's and Harbor Workers'
Compensation Act Amendments of 1984,
Pub. L. No. 98-426, 98 Stat. 1639 (1984)

28(g) For purposes of this section—

(1) in the case of an occupational disease which does not immediately result in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease.

29 C.F.R. § 1504.3 (1965):

Definitions.

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employment, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS, CORRECTLY AND IN ACCORDANCE WITH OTHER CIRCUIT COURT DECISIONS, RULED THAT THE LAW IN EFFECT AT THE TIME OF MANIFESTATION OF THE OCCUPATIONAL DISEASE CONTROLS.

The Court below correctly determined that the law in effect at the time the occupational disease manifests itself is controlling. Thus, since Castorina's asbestosis

manifested itself no earlier than 1975, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq. (1978) as amended in 1972 was determined to be applicable. The court was mindful of the distinction between a traumatic injury and an occupational disease having a long latency period, such as asbestosis, and distinguished cases such as *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). Rather than ruling in a manner inconsistent with other circuits, the Fifth Circuit's opinion in this case relies heavily on *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) cert. denied 52 U.S.L.W. 3756 (1984). It is not coincidental that Castorina makes no reference to *Black* in his petition. The *Black* Court adopted the date of manifestation rule as opposed to the date of last exposure approach reasoning that it best accomplished the underlying purposes of the LHWCA. Those cases, which Castorina relies upon in asserting there is a conflict among the circuits regarding when an injury occurs, do not involve maritime law, do not involve the LHWCA, and are not on point. Instead, *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), cert. denied 454 U.S. 1109 (1981) and *I.N.A. v. Forty Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), cert. denied 454 U.S. 1109 (1981) both involve interpretation of the language in insurance contracts.

Moreover, the adoption of the date of manifestation rule is consistent with the intentions of Congress as found in the 1984 amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1639 (1984). Specifically, Section 28(g) of the 1984 amendments provides that "in the case of an occupational disease which does not immediately result

in a disability or death, an injury shall be deemed to arise on the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disease. . . ." The provisions of Section 28 of the 1984 amendments provide for the effective date of those amendments to claims brought under the act. Paragraph (g) of Section 28 clearly provides that, in the instance of an occupational disease, the date of injury, for the purpose of determining the effective date of the 1984 amendments, is to be determined according to the manifestation rule. Further, the provisions of Section 28(g) clearly evidence a Congressional intention that the manifestation rule should be utilized to determine the law applicable to any claim, including third party suits, under the LHWCA.

Still further, the legislative history of the 1984 amendments to the LHWCA also evidences Congress' intent to adopt the manifestation rule as the uniform rule for determining time of injury in occupational disease cases and the law applicable to claims or suits for occupational diseases. Particularly, it should be noted that the Joint Conference Committee Report stated: "The time of injury for cases involving an occupational disease shall be the time when the claimant becomes aware, or in the exercise of reasonable diligence or by way of medical advice should have been aware of the relationship between the employment, the disease, and the death or disability. The conferees specifically reject the date of last exposure to the injurious substance as the time of injury for determination of pay purposes." House Conference Rep. No. 98-1027, Reprinted in U.S. Code Cong. & Ad. News, 2771, 2779-80 (November 1984). Contrary to

the assertions of Castorina, the opinion of the Fifth Circuit in the instant case is consistent with other circuit authority and the intentions of Congress as revealed through the legislative history of the 1984 amendments to the LHWCA.

II.

REGARDING THE APPLICATION OF OSHA REGULATIONS, THE FIFTH CIRCUIT CORRECTLY RULED THAT LYKES, AS SHIPOWNER, DID NOT VIOLATE ANY DUTY OWED TO CASTORINA.

While Castorina has stated the question presented in the instant case to be "whether Lykes as shipowner, employer of seamen, was obligated to follow OSHA regulations and provide respirators to the longshoremen, employees of Lykes as stevedore," he cites no persuasive authority from any other circuit dealing with this issue in a manner inconsistent with the opinion of the court below. Castorina relies upon 29 C.F.R. § 1504.102(c)(1) (1965) providing that "for protection against pneumoconiosis producing dusts, a respirator equipped with a type of filter provided for such purposes shall be used." This regulation imposes a duty only on Lykes in its capacity as stevedore, not in its capacity as vessel owner. Section 1504.2 of the regulations places responsibility for compliance on "employers" which is defined as "an employer any of whose employees are employed, in whole or in part, in longshoring operations." 29 C.F.R. § 1504.3 (c). Thus, in its capacity as shipowner and in its capacity as an employer of seamen, Lykes had no duty to comply with the regulation in question. Further, under § 905(b), "a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence

in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, n.6 (1983). Any violation of the regulation by Lykes, as stevedore, would be without legal effect, in this action against Lykes, as shipowner.

Castorina's reliance on *American Petroleum Institute v. OSHA*, 581 F.2d 493 (5th Cir. 1978), aff'd 448 U.S. 607 (1980) and *Beatty Equipment Leasing Inc. v. Secretary of Labor*, 577 F.2d 534 (9th Cir. 1978) is misplaced. *American Petroleum* concerned a petition for review of a new health standard which had been promulgated by OSHA regarding the acceptable levels of exposure to benzene. The regulations at issue also included labeling provisions which required employers to assure that caution labels are affixed to containers of benzene and benzene-containing products. The court's statements on the labeling regulation were dicta. The regulations required the employers to "assure that the caution labels remain affixed when the benzene or products containing benzene are sold, distributed, or otherwise leave the employer's work place." *American Petroleum Institute v. OSHA*, supra at 508. Clearly, the responsibility for complying with the regulation at issue in *American Petroleum* was expressly placed upon the employers. This is contrary to the longshoring regulation relied upon by Castorina, compliance with which would be the responsibility of Lykes as stevedore, not as vessel owner. Likewise, in *Beatty Equipment Leasing*, responsibility for complying with the regulation in question was expressly placed upon the employer.

The cases cited by Castorina do not support the conclusion that the regulations in question are applicable to a shipowner. In *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir. 1964), the court was concerned with

a violation of Coast Guard regulations, not OSHA regulations. This is a critical difference since Coast Guard regulations, as the court explained, are made applicable to shipowners. *Id.* at 134 and n.6. Additionally, in *Marshall,* the Court was concerned with an accident occurring prior to the 1972 Amendments of the LHWCA. Similarly, *Reyes v. Vantage Steamship Co., Inc.,* 558 F.2d 238 (5th Cir. 1977) concerned Coast Guard regulations which were expressly made applicable to shipowners. Moreover, *Reyes* involved a claim relating to the death of a seaman, not a longshoreman, under the Jones Act, not the LHWCA. In this connection, the trial court determined, as a matter of fact, that Lykes carried the asbestos cargos in conformity with all shipping regulations, specifically the regulations promulgated by the United States Coast Guard. Finding of Fact, 8.

Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963) cert. denied 376 U.S. 952 (1964) fails to add to the analysis of the instant matter since it was concerned with pre-1972 law under the LHWCA and principally the doctrine of unseaworthiness. Although the Court in *Provenza* explained that the negligent violation of a safety regulation by the stevedore may form the basis for liability as against the shipowner under circumstances where the vessel owner knew or should have known of the stevedore's violation, the factual determination, as discussed by the unanimous circuit court, was that Lykes did not negligently fail to step in and halt the stevedoring operations after becoming aware that the longshoremen were not wearing respirators since Lykes did not know nor should it have known that the condition was unreasonably dangerous. Moreover, as shipowner, Lykes was entitled to rely upon its stevedoring department to act properly.

The opinion of the Ninth Circuit in *Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979) vacated on other grounds, 451 U.S. 978 (1981) is of little force since the Supreme Court vacated that opinion following its opinion in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981). Although *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561 (5th Cir. 1973) was decided following the 1972 amendments of the LHWCA, it concerned a pre-amendment accident and pre-amendment law. Furthermore, the Fifth Circuit, subsequent to its opinion in *Arthur,* has clearly stated that the regulations in question cannot be utilized by a longshorman in his lawsuit against a shipowner. *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977).

III.

THE COURT OF APPEALS CORRECTLY RULED THAT LYKES, AS SHIPOWNER, WOULD NOT BE LIABLE FOR ANY OSHA VIOLATION BY ITS STEVEDORE ARM. FURTHER, THE RULING IS NOT CONTRADICTORY TO ANY FUNDAMENTAL CORPORATE PRINCIPLES.

Section 5(a) of the LHWCA states that "the liability of an employer prescribed in Section 4 of this Act shall be exclusive and in place of all other liability of such an employer to the employee . . ." In the situation, however, where the employer is also the vessel owner, as in the instant action, a separate action is authorized against the employer, but only in its capacity as vessel owner. The Act specifically provides, however, that "no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring

services to the vessel." 33 U.S.C.A. § 905(b). "Of course, Section 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523 (1983) n.6. The legislative history demonstrates the intent of Congress that "the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4705.

Contrary to the assertions of Castorina, the court below correctly analyzed Lykes' responsibility to Castorina as shipowner versus Lykes' responsibility to Castorina as stevedore-employer. Castorina argues, in essence, that Lykes as owner should be responsible for any OSHA violations committed in its stevedore capacity. Such reasoning turns *Pfeiffer* on its head. A longshoreman employed by the shipowner to perform stevedoring operations on the vessel is entitled only to the same treatment as if he were employed in the typical tripartite situation, i.e. vessel owner, independent stevedore, and longshoreman. Such a longshoreman, however, is not entitled to preferential treatment which would necessarily be a result of allowing him to make a third-party action recovery from the vessel owner by reason of the stevedore's violation of regulations. Clearly, the longshoreman could not recover against a vessel owner solely on the basis of an independent stevedore's violation of a regulation; the result should be no different when the stevedore and owner are the same company. Further, the owner-stevedore, for actions committed in its stevedoring capacity,

is entitled to the exclusive liability provisions of the LHWCA. 33 U.S.C.A. § 905(a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of August, 1985, three true and correct copies of the foregoing instrument were sent by regular mail to Mr. Stephen M. Vaughan, Mandell & Wright, 806 Main Street, 21st Floor, Houston, Texas 77002.

Ben L Reynolds

BEN L. REYNOLDS

Supreme Court, U.S.
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Respondent

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

Reply Point: Lykes' assertions in point one of its response are not pertinent to the issue of a shipowner's tort liability. Rather, Lykes' cited authorities deal with longshoremen's compensation—a statutory remedy. The question before the Court does not concern compensation but whether the 1972 amendments to the LHWCA abrogated a maritime remedy for wrongful conduct that occurred prior to 1972.

It is fundamental that a party becomes subject to liability on the date when it commits wrongful acts. RESTATEMENT (SECOND) OF TORTS § 5 comment a (1965). Lykes committed wrongful acts, in its capacity as a ship-

owner, between 1965 and 1972 by providing unseaworthy vessels with raw asbestos loose in the holds. Castorina suffered "injury" when he inhaled the asbestos fibers. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974) (each exposure to asbestos may result in an additional and separate injury).

Lykes' reference to Section 28(g) of the 1984 amendments to the LHWCA is immaterial since the amendments were not effective until September 28, 1984, long after Castorina was injured. Moreover, the amendments do not change the definition of "injury" which embraces both the initial injury as well as any resulting occupational disease. 33 U.S.C. § 902(2) (1978). *Todd Shipyards Corp. v. Black,* 717 F.2d 1280 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1910 (1984), was concerned only with computing an employee's average weekly wage to determine compensation benefits. It did not involve a shipowner's tort liability, nor did it decide whether pre-1972 or post-1972 law applied. Further, *Todd Shipyards* focused on the loss of future earning capacity, not on the past wrongful conduct of a shipowner. 717 F.2d at 1289. Similarly, by its own language the cited House Conference Report also concerns compensation. Conf. Rep. No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2771, 2780.

"[I]njury does not mean disability." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952). "Disability" means incapacity or lack of ability to earn wages. 33 U.S.C. § 902(10)(1978). Significantly, Concress defined both "disability" and "injury" in the LHWCA, and its awareness of the difference is apparent throughout. *Pillsbury, supra,* 342 U.S. at 199.

Compensation provisions of the LHWCA and any case construing those provisions, such as *Todd Shipyards,* are concerned with disability and do not bear on the issue of damages for wrongful conduct. Those provisions do not apply to the definition of "injury" in determining a shipowner's liability. Rather, the cases cited previously by Castorina are closer aligned to the analysis required for such determination. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied,* 454 U.S. 1109 (1981); *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied,* 454 U.S. 1075 (1981). Those cases hold that a wrongdoer becomes subject to liability when the "injury"—inhalation of asbestos fibers—occurs.

II.

Reply point: The OSHA regulation in question, 29 C.F.R. § 1504.102(c)(1) (1965), should be applied to Lykes as shipowner since Lykes as shipowner created the hazard.[1] Lykes misapprehends the teachings of Castorina's cited authorities—that one employer must be held accountable for dangers which it has created and imposed upon another employer's workers. *American Petroleum Institute v. OSHA,* 581 F.2d 493 (5th Cir. 1978), *aff'd* 448 U.S. 607 (1980); *Beatty Equipment Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir. 1978).

Further, Section 1504.2(b) of the OSHA regulations places no additional responsibilities on vessel owners "unless such persons are acting as employers."[2] The clear import of this language is that if a vessel owner is also

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1. The regulation is quoted in Castorina's Petition at A-49.

2. This regulation is also quoted in Castorina's Petition at A-49.

acting as an employer of a longshoreman, the regulations do in fact place additional responsibilities on the vessel owner. This was recognized by the Fifth Circuit in *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331, 333 (5th Cir. 1977).

Finally, Section 1504.2(b) expressedly continued the effect of the law existing at the time the regulation was promulgated: "[N]or is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or *duties now placed upon them by law,* regulation, or custom." *Id.* Moreover, nothing in the 1972 amendments of the LHWCA changed the application of OSHA regulations in longshoring. There has been no statute or court opinion to change pre-1972 interpretations of negligence per se for regulatory violation. Consequently, the test found in *Marshall v. Isthmian Lines, Inc.,* 334 F.2d 131 (5th Cir. 1964), continues to apply. Indeed, the *Marshall* test has been applied since the 1972 LHWCA amendments in a case involving an OSHA regulation. *Arthur v. Flota Mercante Gran Centro Americana, S.A.,* 487 F.2d 561 (5th Cir. 1973).

Another significant case brought forward by Section 1504.2(b) is *Provenza v. American Export Lines, Inc.,* 324 F.2d 660 (4th Cir. 1963). Like *Marshall, Provenza* has been cited with approval by the Fifth Circuit in *Arthur, supra,* and in *Reyes v. Vantage SS Co., Inc.,* 558 F.2d 238 (5th Cir. 1977). *Provenza* teaches that OSHA regulations are binding on the shipowner where he knew or should have known of a violation of the safety regulations. Lykes argues that it, as shipowner, did not know that the condition was unreasonably dangerous. Unless

the regulation specifically requires knowledge, merely doing the proscribed act constitutes a violation. *Marshall, supra,* 334 F.2d at 134. The court below stated that "Lykes knew of the dusty conditions and knew that the men were not wearing respirators." 758 F.2d at 1036. Accordingly, Lykes, as shipowner, knew of the violation.

Lykes, as shipowner, created the hazard which injured Castorina; Lykes, as shipowner, bore additional responsibilities since it also acted as Castorina's employer; and Lykes, as shipowner, knew that its stevedoring arm was violating an OSHA regulation.

III.

Reply point: It would be inconsistent with Congress' concern for the safety of longshoremen to hold flatly that no shipowner owes a duty to longshoremen to comply with OSHA regulations. This concern will be ignored if a shipowner, merely by doing its own stevedoring, can escape liability for injuries caused by the hazard which it has created.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that on the 21 day of August, 1985, three true and correct copies of the foregoing instrument were sent by regular mail to Mr. Ben L. Reynolds, Royston, Rayzor, Vickery & Williams, 205 Cotton Exchange Building, Galveston, Texas 77550.

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STEPHEN M. VAUGHAN